

## § 1.367(b)-1

## 26 CFR Ch. I (4-1-11 Edition)

- (ii) Offset rule.
- (iii) Related taxes.
- (3) Examples.
- (e) Pre-pooling annual layers.
- (1) If foreign surviving corporation is a pooling corporation.
  - (i) Qualifying earnings and taxes.
  - (ii) Carryover rule.
  - (iii) Deficits.
  - (A) In general.
  - (B) Aggregate positive pre-1987 accumulated profits.
  - (C) Aggregate deficit in pre-1987 accumulated profits.
  - (D) Deficit and positive separate categories within annual layers
  - (iv) Pre-1987 section 960 earnings and profits and foreign income taxes.
  - (v) Examples.
- (2) If foreign surviving corporation is a nonpooling corporation.
  - (i) Qualifying earnings and taxes.
  - (ii) Carryover rule.
  - (iii) Deficits.
  - (A) In general.
  - (B) Aggregate positive pre-1987 accumulated profits.
  - (C) Aggregate deficit in pre-1987 accumulated profits.
  - (D) Deficit and positive separate categories within annual layers.
  - (iv) Pre-1987 section 960 earnings and profits and foreign income taxes.
  - (v) Examples.
- (f) Special rules.
- (1) Treatment of deficit.
  - (i) General rule.
  - (ii) Exceptions.
  - (iii) Examples.
- (2) Reconciling taxable years.
- (3) Post-transaction change of status.
- (4) Ordering rule for multiple hovering deficits.
  - (i) Rule.
  - (ii) Example.
- (5) Pro rata rule for earnings and deficits during transaction year.
- (g) Effective date.

*§ 1.367(b)-8 Allocation of earnings and profits and foreign income taxes in certain foreign corporate separations. [Reserved]*

*§ 1.367(b)-9 Special rule for F reorganizations and similar transactions.*

- (a) Scope.
- (b) Hovering deficit rules inapplicable.
- (c) Foreign divisive transactions. [Reserved]
- (d) Examples.
- (e) Effective date.

[T.D. 8862, 65 FR 3596, Jan. 24, 2000; 65 FR 66501, Nov. 6, 2000, as amended by T.D. 8937, 66 FR 2257, Jan. 11, 2001; T.D. 9273, 71 FR 44984, Aug. 8, 2006]

## § 1.367(b)-1 Other transfers.

(a) *Scope.* The regulations promulgated under section 367(b) (the section 367(b) regulations) set forth rules regarding the proper inclusions and adjustments that must be made as a result of an exchange described in section 367(b) (a section 367(b) exchange). A section 367(b) exchange is any exchange described in section 332, 351, 354, 355, 356 or 361, with respect to which the status of a foreign corporation as a corporation is relevant for determining the extent to which income shall be recognized or for determining the effect of the transaction on earnings and profits, basis of stock or securities, basis of assets, or other relevant tax attributes. For rules coordinating the concurrent application of sections 367(a) and (b), see § 1.367(a)-3(b)(2).

(b) *General rules*—(1) *Rules.* The following general rules apply under the section 367(b) regulations—

(i) A foreign corporation in a section 367(b) exchange is considered to be a corporation and, as a result, all of the related provisions (*e.g.*, section 381) shall apply, except to the extent provided in the section 367(b) regulations; and

(ii) Nothing in the section 367(b) regulations shall permit—

(A) The nonrecognition of income that would otherwise be required to be recognized under another provision of the Internal Revenue Code or the regulations thereunder; or

(B) The recognition of a loss or deduction that would otherwise not be recognized under another provision of the Internal Revenue Code or the regulations thereunder.

(2) *Example.* The following example illustrates the rules of this paragraph (b):

*Example.* (i) *Facts.* DC, a domestic corporation, owns 90 percent of P, a partnership. The remaining 10 percent of P is owned by a person unrelated to DC. P owns all of the outstanding stock of FC, a controlled foreign corporation. FC liquidates into P.

(ii) *Result.* FC's liquidation is not a transaction described in section 332. Nothing in the section 367(b) regulations, including § 1.367(b)-2(k), permits FC's liquidation to qualify as a liquidation described in section 332.

(c) *Notice Required*—(1) *In general.* A notice under this paragraph (c) (section 367(b) notice) must be filed with regard to any person described in paragraph (c)(2) of this section. A section 367(b) notice must be filed in the time and manner described in paragraph (c)(3) of this section and must include the information described in paragraph (c)(4) of this section.

(2) *Persons subject to section 367(b) notice.* The following persons are described in this paragraph (c)(2)—

(i) A shareholder described in § 1.367(b)-3(b)(1) that realizes income in a transaction described in § 1.367(b)-3(a);

(ii) A shareholder that makes the election described in § 1.367(b)-3(c)(3);

(iii) A shareholder described in § 1.367(b)-4(b)(1)(i)(A)(I) or (2) that realizes income in a transaction described in § 1.367(b)-4(a);

(iv) A shareholder that realizes income in a transaction described in § 1.367(b)-5(c) or 1.367(b)-5(d) and that is either—

(A) A section 1248 shareholder of the distributing or controlled corporation; or

(B) A foreign corporation with one or more shareholders that are described in paragraph (c)(2)(iv)(A) of this section; and

(v) A foreign surviving corporation described in § 1.367(b)-7(a).

(3) *Time and manner for filing notice*—(i) *United States persons described in § 1.367(b)-1(c)(2).* A United States person described in paragraph (c)(2) of this section must file a section 367(b) notice attached to a timely filed Federal tax return (including extensions) for the person's taxable year in which income is realized in the section 367(b) exchange. In the case of a shareholder that makes the election described in § 1.367(b)-3(c)(3), notification of such election must be sent to the foreign acquired corporation (or its successor in interest) on or before the date the section 367(b) notice is filed, so that appropriate corresponding adjustments can be made in accordance with the rules of § 1.367(b)-2(e).

(ii) *Foreign corporations described in § 1.367(b)-1(c)(2).* Each United States person listed in this paragraph (c)(3)(ii) must file a section 367(b) notice with

regard to a foreign corporation described in paragraph (c)(2) of this section. Such notice must be attached to a timely filed Federal tax return (including extensions) for the United States person's taxable year in which income is realized in the section 367(b) exchange and, if the United States person is required to file a Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations), the section 367(b) notice must be attached to the Form 5471. The following persons are listed in this paragraph (c)(3)(ii)—

(A) United States shareholders (as defined in § 1.367(b)-3(b)(2)) of foreign corporations described in paragraph (c)(2)(i) or (v) of this section; and

(B) Section 1248 shareholders of foreign corporations described in paragraph (c)(2)(iii) or (iv) of this section.

(4) *Information required.* Except as provided in paragraph (c)(5) of this section, a section 367(b) notice shall include the following information—

(i) A statement that the exchange is a section 367(b) exchange;

(ii) A complete description of the exchange;

(iii) A description of any stock, securities or other consideration transferred or received in the exchange;

(iv) A statement that describes any amount (or amounts) required, under the section 367(b) regulations, to be taken into account as income or loss or as an adjustment (including an adjustment under § 1.367(b)-7 or 1.367(b)-9) to basis, earnings and profits, or other tax attributes as a result of the exchange;

(v) Any information that is or would be required to be furnished with a Federal income tax return pursuant to regulations under section 332, 351, 354, 355, 356, 361, 368, or 381 (whether or not a Federal income tax return is required to be filed), if such information has not otherwise been provided by the person filing the section 367(b) notice;

(vi) Any information required to be furnished with respect to the exchange under sections 6038, 6038A, 6038B, 6038C or 6046, or the regulations under those sections, if such information has not otherwise been provided by the person filing the section 367(b) notice; and

(vii) If applicable, a statement that the shareholder is making the election

## § 1.367(b)-2

## 26 CFR Ch. I (4-1-11 Edition)

described in § 1.367(b)-3(c)(3). This statement must include—

(A) A copy of the information the shareholder received from the foreign acquired corporation (or its successor in interest) establishing and substantiating the shareholder's all earnings and profits amount with respect to the shareholder's stock in the foreign acquired corporation; and

(B) A representation that the shareholder has notified the foreign acquired corporation (or its successor in interest) that the shareholder is making the election described in § 1.367(b)-3(c)(3).

(5) *Abbreviated notice provision for shareholders that make the election described in § 1.367(b)-3(c)(3).* In the case of a foreign acquired corporation that has never had earnings and profits that would result in any shareholder having an all earnings and profits amount, a shareholder making the election described in § 1.367(b)-3(c)(3) may satisfy the information requirements of paragraph (c)(4) of this section by filing a section 367(b) notice that includes—

(i) A statement from the foreign acquired corporation (or its successor in interest) that the foreign acquired corporation has never had any earnings and profits that would result in any shareholder having an all earnings and profits amount; and

(ii) The information described in paragraphs (c)(4) (i) through (iii) of this section.

(6) *Supplemental published guidance.* The section 367(b) notice requirements may be updated or amended by revenue procedure or other published guidance.

[T.D. 8862, 65 FR 3597, Jan. 24, 2000; 65 FR 66501, Nov. 6, 2000, as amended by T.D. 9243, 71 FR 4288, Jan. 26, 2006; T.D. 9273, 71 FR 44894, Aug. 8, 2006]

### § 1.367(b)-2 Definitions and special rules.

(a) *Controlled foreign corporation.* The term *controlled foreign corporation* means a controlled foreign corporation as defined in section 957 (taking into account section 953(c)).

(b) *Section 1248 shareholder.* The term *section 1248 shareholder* means any United States person that satisfies the ownership requirements of section 1248 (a)(2) or (c)(2) with respect to a foreign corporation.

(c) *Section 1248 amount—(1) Rule.* The term *section 1248 amount* with respect to stock in a foreign corporation means the net positive earnings and profits (if any) that would have been attributable to such stock and includible in income as a dividend under section 1248 and the regulations thereunder if the stock were sold by the shareholder. In the case of a transaction in which the shareholder is a foreign corporation (foreign shareholder), the following additional rules shall apply—

(i) The foreign shareholder shall be deemed to be a United States person for purposes of this paragraph (c), except that the foreign shareholder shall not be considered a United States person for purposes of determining whether the stock owned by the foreign shareholder is stock of a controlled foreign corporation; and

(ii) The foreign shareholder's holding period in the stock of the foreign corporation shall be determined by reference to the period that the foreign shareholder's section 1248 shareholders held (directly or indirectly) an interest in the foreign corporation. This paragraph (c)(1)(ii) applies in addition to the section 1248 regulations' incorporation of section 1223 holding periods. See § 1.1248-8.

(2) *Examples.* The following examples illustrate the rules of this paragraph (c):

*Example 1.* (i) *Facts.* DC, a domestic corporation, owns all of the outstanding stock of FC1, a controlled foreign corporation (CFC). FC1 owns all of the outstanding stock of FC2, a CFC. DC has always owned all of the stock of FC1, and FC1 has always owned all of the stock of FC2.

(ii) *Result.* Under this paragraph (c), DC's section 1248 amount with respect to its FC1 stock is computed by reference to all of FC1's and FC2's earnings and profits. See section 1248(c)(2). Because FC1's section 1248 shareholder (DC) always indirectly held all of the stock of FC2, FC1's section 1248 amount with respect to its FC2 stock is computed by reference to all of FC2's earnings and profits.

*Example 2.* (i) *Facts.* DC, a domestic corporation, owns 40 percent of the outstanding stock of FC1, a foreign corporation. The other 60 percent of FC1 stock is owned (directly and indirectly) by foreign persons that are unrelated to DC. FC1 owns all of the outstanding stock of FC2, a foreign corporation. On January 1, 2001, DC purchases the remaining 60 percent of FC1 stock.